

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

SERVICE TAX APPEAL NO. 11785 OF 2016-DB

(Arising out of OIA-AHM-SVTAX-000-APP-49-16-17 dated 21/07/2016 passed by Commissioner of Central Excise-AHMEDABAD-II)

Sai Consulting Engineers Pvt Ltd

.....Appellant

Sai House, satyam Square,
B/h. Rajpath Club, Bodakdev,
Ahmedabad, Gujarat

Versus

C.C.-AHMEDABAD

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

With

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APPEARANCE:

Shri Sanjay Singhal, Advocate for the Appellant
Shri P Ganesan, Superintendent (AR) for the Respondent

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

Final Order No. 11481-11482/2024

DATE OF HEARING: **04.03.2024**
DATE OF DECISION: **02.07.2024**

RAMESH NAIR

The brief facts of the case are that the appellant is Private Ltd Company primarily involved in providing consulting engineer service. During the relevant period, the appellant operated as a sub/associate consultant for several foreign based consulting engineering firms, including M/s. Louis Berger, M/s Frischmann Prabhu (India) Pvt Ltd, M/s Dorch Consultant (India) Pvt Ltd and M/s.Renardet S.A Ingenieurs. The said main/prime consultants have discharged their service tax on total consultancy charges including the consultancy fees paid to the appellant. Therefore, the appellant have not paid the service tax on the consulting engineer service provided by them as sub/associate consultant. The show cause notice dated 20.10.2008 was issued for the period F.Y 2005-2006 and 2006 -2007 proposing the demand of Rs. 30,71,200/- along with interest and equal penalty under Section 78 of the Finance Act, 1994. Another show cause notice was issued for the period April, 2007 to March, 2008 proposing the demand of Rs. 14,34,845/- along with interest and penalty under Section 76 of the Finance Act, 1994. Both show cause notice have been adjudicated and demand proposed under the show cause notice have been confirmed along with interest and penalty. Being aggrieved by the Orders-In-Original dated 07.08.2009 and 06.08.2009 the appellant filed appeals before the Commissioner (Appeals) who vide impugned order in appeal dated 21.07.2016 rejected the appeal. Therefore, the present two appeals were filed by the appellant before this Tribunal.

2. Shri Nikhil Gupta, Learned Counsel appearing on behalf of the Appellant at the outset submits that during the relevant period the appellant has acted as sub/associate consultant for the main consultant, therefore, being sub consultant they were not liable to pay the service tax since the main consultant has discharged the service tax on the value which includes the value paid to the appellant in terms of Trade Notice No. 53-CE (Service Tax)/97 dated 04.07.1997. This position was changed from 23.08.2007

wherein vide Circular No. 96/7/2007 –ST it was clarified that the sub-contractor is liable to pay the service tax even though the main contractor is discharging the service tax liability. He submits that the period involved is prior to 23.08.2007 thereafter the appellant started discharging the service tax liability, therefore, the demand does not sustain.

2.1 He also submits that the circular whereby the appellant is not liable to pay the service tax was prevailing prior to 23.08.2007. Even though vide circular dated 23.08.2007 the sub-contractor was made liable to pay the service tax but before this date as per the earlier circular of 1997, the service tax cannot be demanded. He further submits that since there were contrary views and the matter was finally decided by the larger bench in the case of Commissioner of Service Tax, New Delhi vs. Melange Developer – 2020 (33) GSTL 116 (Tri.- LB) the demand for extended period does not sustain on limitation. He placed reliance on the following judgments:-

2.2 As regard the demand of cenvat credit amounting to Rs.61,200/-. He submits that the Adjudicating Authority has wrongly denied the credit by invoking the wrong rule i.e. Rule 9 (1) (g) of Cenvat Credit Rules, 2004 read with Rule 4 A (ii) of Service Tax Rules, 1994. He submits that this provisions is for input service distributor which is not the case here. In the present case the appellant have received the service directly from the service provider therefore, invoking the provision of input service distributor is incorrect and on that basis itself the order is incorrect denying the cenvat credit. He submits that except non mention of registration number of service provider, there is no discrepancy in the input service invoice. Therefore, credit cannot be denied.

3. Shri Anoop Kumar Mudvel, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the appellant have provided the service in

the capacity of sub/associate consultant to the main consultant. In view of 1997 circular the sub-contractor was not supposed to pay the service tax in a case where the main consultant is paying the service tax. In the present case the appellant have enclosed the certificate from the main consultant who have declared that they have discharged the service tax on the total value including the value paid to the appellant. The 1997 circular was amended and as per new circular No. 96/7/2007-ST dated 23.08.2007 it was clarified that the sub-contractor is also required to pay the service tax irrespective whether the main contractor discharge the service tax. Accordingly, from 23.08.2007 the appellant being a sub – consultant became liable to pay the service tax. Prior to this date during the currency of 1997 circular, the appellant is not liable to pay the service tax as settled by the Hon'ble Apex Court in various judgments that the benefit flowing from the circular cannot be denied and the circular dated 23.08.2007 cannot be made applicable retrospectively. Therefore, we hold the demand of service tax prior to 23.08.2007 is not sustainable.

4.1 The appellant have submitted that they have discharged the service tax with effect from 23.08.2007, therefore, the demand for the period 23.08.2007 onwards will not sustain.

There is one more issue that though the service was provided prior to 23.08.2007 but the payment thereof was received by the appellant after this date, therefore, as per the department the said consideration is liable to service tax. In this regard it is a settled legal position that at the relevant time it is the date of provision of service, the service tax is leviable. In the present case admittedly the service was provided prior to 23.08.2007 for which the demand was raised on the ground that the payment was received after 23.08.2007. We are of the view that as per date of provision of service if it is prior to 23.08.2007 even though the payment was received after 23.08.2007,

the demand will not sustain. However, this aspect needs to be verified by the Adjudicating Authority.

4.2 As regard the demand of cenvat credit of Rs. 61,200/- we find that the Adjudicating Authority has made a serious error in as much as the cenvat credit was denied invoking the Rule 9 (1) (g) of Cenvat Credit Rules, 2004 read with Rule 4 A(ii) of Service Tax Rules, 1994. This provision is applicable to only in a case where cenvat credit is availed on input service distributor's invoice whereas as per the fact the appellant have availed the cenvat credit on the invoice of service provider. Therefore, the entire basis for denial of cenvat credit is wrong and the credit was wrongly denied. The only discrepancy in the invoice is that the service provider has not mentioned the service tax registration which in our view is merely a procedural lapse particularly when there is no case of department that the service tax on such invoice was not paid by the service provider. Therefore on this basis the lower authorities have wrongly denied the cenvat credit, which we set aside.

5. In view of our above discussion and finding, the impugned order stands modified to the above extent. Appeals are allowed in above terms.

(Pronounced in the open court on **02.07.2024** *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)